

August 20, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 04-0028

Mr. Robert B. Crews, Jr.
President
The Benjamin Company, Inc.
2874 Red Arrow Drive
Las Vegas, NV 89135

Dear Mr. Crews:

This is in response to the appeal you filed on behalf of your firm, The Benjamin Company, Inc. (TBC). We have carefully reviewed the material from the state of Washington Office of Minority and Women's Business Enterprises (OMWBE), as well as that you submitted, and have concluded that the denial of TBC's certification as an eligible Disadvantaged Business Enterprise (DBE) under criteria set forth in 49 CFR Parts 23 and 26 ("the Regulation") is supported by substantial evidence.

Your appeal is denied based upon our determination that substantial record evidence supports OMWBE's conclusion that TBC is not a small business concern as defined pursuant to Section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR Part 121) that does not exceed the cap on average annual gross receipts specified in §26.65(b).

How are burdens of proof allocated in the certification process? The Regulation provides that firms seeking DBE certification has the burden of proof by demonstrating to the recipient, that they meet the requirements of the regulation for group members, individual disadvantage, business size, ownership, and control, by a preponderance of the evidence (more likely than not). In reviewing all facts of the record, this office has concluded that TBC failed to meet its burden, by a preponderance of the evidence, with regards to business size.

The specific reasons for the denial of your appeal include the following:

- 1) The Regulation also provides in 49 CFR Part 26.65 (a) that "To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. You must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts."**

According to the record information, TBC is a holding company and provides Administrative services to Benjamin Books, News Emporium, Inc., News Emporium, Inc. (DC), and Sports Emporium, Inc.

OMWBE concluded that TBC for the purposes of the DBE program falls under the NAICS Code 551112 "Offices of Other Holding Companies." The size standard for this classification is \$6 million.

The firm's gross receipts are as follows:

2000 total income	\$ [REDACTED]
2001 total income	\$ [REDACTED]
2002 total income	\$ [REDACTED]
	\$ [REDACTED]
3 year Average	\$ [REDACTED] Edited over \$6,000,000.00

The three-year average exceeds the \$6,000,000 size standards for NAICS code 551112. Your letter of rebuttal states "The firm is a small business. When The Benjamin Co. had several book stores in order to obtain financing Benjamin Books were combined into The Benjamin Co. The Benjamin Co. is Benjamin Books, Seattle Airport only. Although the company is not a holding company, I am not sure why that would even be an issue as holding companies are not addressed in the DOT regulations. This applicant is attempting for DOT certification as required by SEATAC, not local certification. Under the DOT/DBE size standards, our three year average sales are below that measure. Annual gross revenue for a DBE business is 33.2 million." Our review of the record substantiates that according to the Schedule K of the tax returns for The Benjamin Company, Inc. and subsidiaries for tax year 2001 and 2002 lists:

- 2 a. Business activity no. 453990;
- b. Business activity the firm-- a Holding company; and
- c. Product or service--Administration.

It appears that OMWBE's conclusion is based upon substantial record evidence. It is also important to note that contrary to your statement, the Department's Size standard for concessions is \$30 million average over a three year period.

In §23.89 a *concession* "means a for-profit business enterprise, located on an airport subject to this subpart, that is engaged in the sale of consumer goods or services to the public under an agreement with the sponsor, another concessionaire, or the owner of the terminal, if other than the sponsor. Businesses which conduct an aeronautical activity are not considered concessionaires for purposes of this subpart."

§23.89 states "businesses operating under the following arrangements are not eligible for certification as DBE's under this subpart:

- (1) Limited partnerships, in which a non-DBE is the general partner.

(2) Other arrangements that do not provide for ownership and control by the socially and economically disadvantaged owners.”

§26.73(e) states “An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm—even a DBE firm—cannot be an eligible DBE.”

(1) “If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, you may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.”

(f) “Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.”

The Benjamin company, Inc. according to the tax returns is a holding company and for purposes of the Department’s DBE program a holding company cannot be certified as a concession. We concur with OMWBE’s determination that TBC does not meet the definition of a concession and exceeds the size standards for a holding company.

In summary, the information provided cumulatively supports a conclusion that The Benjamin Company does not meet the criteria as required for DBE certification under 49 CFR Parts 26. The company is, therefore, ineligible to participate as a DBE on OMWBE’s Federal financially assisted projects. This determination is administratively final as of the date of this correspondence.

Sincerely,

Original Signed By

Joseph E. Austin, Chief
External Policy and Program Development Division
Departmental Office of Civil Rights

cc: OMWBE